Supreme Court, U.S.
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In the Supreme Court of the United States

USX CORPORATION,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Erie Railroad Co. v. Tompkins mandates that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." However, neither Erie, nor any subsequent decision of this Court, provides adequate guidance as to how state law is to be ascertained when it is unsettled or has not been addressed by the highest state court. As a result, it has been empirically established that state law is all too frequently ignored and that the "... federal common law survives despite its formal interment in the Erie decision".[1] The questions are:

1. Whether the Supreme Court of the United States should implement a presumption in favor of certifying substantial unanswered questions of state law to assure that the respect for judicial federalism, that Erie sought to achieve, is effectuated?

2. Whether the judgment of the Court of Appeals should be vacated, and the issue of state law the Court of Appeals found to be unanswered certified to the Supreme Court of Pennsylvania?

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[1] William M. Landes & Richard A. Posner, Legal Change, Judicial Behavior, and The Diversity Jurisdiction, 9 J. Legal Stud. 367, 375 (1980).

A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

USX Corporation

Liberty Mutual Insurance Company

Amici Curiae:

American Insurance Association
Property Casualty Insurers Association of America
The Insurance Federation of Pennsylvania, Inc.
Pennsylvania Compensation Rating Bureau
Complex Insurance Claims Litigation Association

CORPORATE DISCLOSURE STATEMENT

United States Steel Corporation is the successor by merger with USX Corporation. United States Steel Corporation does not have a parent company. No publicly held companies hold 10% or more of United States Steel Corporation's stock.

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McCarran-Ferguson Act, Mar. 9, 1945, ch 20, §1, 59 Stat. 33, 15 U.S.C. §1011 . . . . . 24, 25

Law Reviews and Miscellaneous Authorities

Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice (American Judicature Society 1995) 27

Black, Address by Mr. Justice Black,
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Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie, 145 U. Pa. L. Rev. 1459 (1997) . . . . . *passim*

Cochran, Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study, 29 J. Legis. 157 app. A at 223 (2003) 22

Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts, Recommendation 8 at 32 (2d prtg. 1995) 26

George Wharton Pepper, The Border Land of Federal and State Decisions 23-25 (1889) 24

Hogue, Law in a Parallel Universe: Erie's Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform, 11 Ga. St. U. L. Rev. 531 (1995) 23

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Thomas, The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?",
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Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in the Case by Courts

USX Corporation v. Liberty Mutual Insurance Company, 444 F.3d 192 (3d Cir. 2006).

Opinions Below

The Judgment of the Court of Appeals sought to be reviewed was entered on April 10, 2006. The Petition for Rehearing was denied by the Court of Appeals on May 8, 2006. This Honorable Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

Jurisdiction

28 U.S.C. §1254(1) gives the Supreme Court the power to review cases in the courts of appeals by writ of certiorari granted upon the petition of any party to a civil case.

The Constitutional Provision Involved in the Case

In Erie Railroad Co. v. Tompkins, 304 U.S. 64 at 78 (1938), the Court said:

> Congress has no power to declare substantive rules of common law applicable to a state whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie does not expressly state what provision of the Constitution is violated when federal courts declare substantive rules of common law. It is widely assumed,

however, that the Court was referring to the Tenth Amendment to the U.S. Constitution. That amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people."

Statement of the Case

Nearly seven decades ago, this Court made clear that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). However, little guidance has been provided to assure compliance with that constitutionally based mandate. As a result, it has been empirically established that state law is all too frequently ignored and that "the federal common law survives despite its formal interment in the Erie decision." William M. Landes & Richard A. Posner, Legal Change, Judicial Behavior, and The Diversity Jurisdiction, 9 J. Legal Stud. 367, 375 (1980). This Petition asks this Court to create a presumption in favor of certifying controlling issues of unsettled or unanswered state law to assure that Erie's mandate, and the respect for the principles of judicial federalism upon which it is based, are in fact effectuated.

The Background:

USX is the insured on Employers' Liability policies issued annually by Liberty Mutual from 1912 to 1980.[2] All policies

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[2] Only those policies for the period 1952-1980 are at issue. Neither party has been able to locate the actual policies issued to USX. The Court of Appeals assumed all policies were combined Workers' Compensation/Employers' Liability (WC/EL) policies.

are "National Policies" issued to USX at its home office in Pittsburgh, Pennsylvania, and provide coverage for USX's operations throughout the United States. It is agreed the extent of coverage the policies provide is governed by Pennsylvania law.

The policies compel Liberty Mutual to provide USX with a defense and indemnity for claims by employees who, while within the scope of their employment, sustain bodily injury by accident or bodily injury by disease caused by the insured's negligence and which are outside the scope of the barriers to suit created by any applicable workers' compensation law. The policies do not define the term "Bodily Injury by Accident", but expressly provide that the term includes "such disease as results directly from a bodily injury by accident."[3]

Employee claims for bodily injury by accident are covered no matter when asserted so long as the injury occurs during the effective dates of a policy. Claims for bodily injury by disease must be brought within thirty-six (36) months after the end of the policy period. [Insuring Agreements, Exclusion (e).]

The record establishes, however, that Liberty Mutual also marketed free-standing EL policies during this period. Both policies contain the identical definitions of the terms "bodily injury by accident" and "bodily injury by disease" that are at issue in this case. Specimens of both policies are set forth in the Appendix to this Petition at App. F and App. G.

[3] Conversely, the definition provides that "the term 'bodily injury by disease' includes only such disease as is not within the term 'bodily injury by accident.'"

Commencing with a suit filed in 1992, and continuing to date, some 200 wrongful death claims have been made against USX by personal representatives of deceased former employees of its Texas works. Each suit contends that USX was grossly negligent in exposing the employee to asbestos contaminated premises and/or products; that, as a result of such exposure, the employee sustained an injury; and that the employee subsequently died from an asbestos-related disease. USX submitted each claim to Liberty Mutual with a request that it be provided with a defense and indemnity. Liberty Mutual denied each request solely on the basis of Exclusion (e), an exclusion it admits has no applicability to claims for bodily injury by accident.

USX countered Liberty Mutual's contention that the underlying claims are claims for bodily injury by disease by reference to the policy definition of bodily injury by accident which expressly includes "**such disease as results directly from a bodily injury by accident**"; and to the holding of the Supreme Court of Pennsylvania in J. H. France Refractories Co. v. Allstate Insurance Co., 534 Pa. 29, 626 A.2d 502 (1993). In that case, the manufacturer of an asbestos-containing product was sued by customers who had contracted asbestos-related diseases. The manufacturer sought indemnity and a defense from all insurers who had provided it with coverage from 1967 through 1979 for bodily injuries caused by an "occurrence", which each policy defined as an "accident". In the course of holding that every insurer on the risk from the date the customer was first exposed to asbestos to the date the asbestos-related disease manifested itself was liable for the entire loss, the Pennsylvania Supreme Court accepted as scientific fact and made part of its holding medical testimony (1) that a bodily injury occurs immediately upon exposure to asbestos; and (2) that it is those injuries that lead to and are the cause of the subsequently occurring asbestos-

related disease. Based upon the Supreme Court's holding in J. H. France, USX contended that each of the underlying claims was a claim for an asbestos-related disease that "results directly from a bodily injury by accident" and is, accordingly, a claim for bodily injury by accident as that term is broadly defined in the Liberty Mutual policies and outside the scope of the exclusion applicable only to bodily injury by disease.

The Proceedings in the District Court:

USX then commenced this suit contending that Liberty Mutual breached the contracts of insurance by not providing it with a defense and indemnity; and was guilty of bad faith in denying its request without having a reasonable basis for doing so.

Liberty Mutual filed a Motion for Summary Judgment to all counts; and USX filed a Cross-Motion for Summary Judgment as to liability. USX attached to its Cross-Motion, the Affidavit of Murray Sachs, M.D., a pulmonary disease specialist who averred that exposure to asbestos causes an immediate bodily injury; and that the subsequently manifested asbestos-related diseases are diseases that result directly from the initial injury [App. H, 71a-72a]. Liberty Mutual did not controvert Dr. Sachs' affidavit.

On May 14, 2002, Magistrate Judge Sensenich issued a Report and Recommendation that Liberty Mutual's Motion for Summary Judgment be granted as to Count III (Insurance Bad Faith) and denied as to Counts I (Breach of Insurance Contracts), II (Declaratory Judgment) and IV (Indemnity). The Magistrate Judge also recommended that USX's Cross-Motion for Summary Judgment as to liability be granted as to Counts I, II, and IV; and denied as to Count III. The Motion

and Cross-Motion for Summary Judgment to Count V (Reformation/Estoppel) were dismissed as being moot.

Objections to the Magistrate Judge's Report and Recommendation were denied by Distr ct Judge Ziegler, who entered an Order adopting the Report and Recommendation on June 27, 2002. Following agreement as to damages, a Final Judgment order was entered on January 7, 2004.

Liberty Mutual filed a Notice of Appeal on February 2, 2004; and USX Corporation filed a Notice of Cross-Appeal on February 3, 2004.

The Proceedings in the Court of Appeals:

A panel of the Court of Appeals reversed the Judgment in favor of USX on Counts I, II, and IV of the Complaint (the Breach of Contract and Indemnity Counts); affirmed the Judgment in favor of Liberty Mutual on Count III of the Complaint (Insurance Bad Faith); and remanded to the District Court with instructions to enter judgment in favor of Liberty Mutual on all remaining counts.

In so doing, the panel concluded that the Supreme Court of Pennsylvania had not considered "the precise issue before us"; and predicted that Court "would look to the substantial body of workmen's compensation precedent" to define the term "accident" in an Employer's Liability policy. Then, citing and relying upon a half-century old precedent from a Pennsylvania intermediate court, the panel concluded that an accident requires "a sudden and unexpected event" resulting in "a distinct happening ... at a particular time." Loudon v. H. W. Shaull & Sons, 140 Pa. Super. 106, 13 A.2d 129, 130 (1940). The definition set forth in Loudon and relied upon by the Court of Appeals was expressly rejected by the Supreme

Court of Pennsylvania in Hinkle v. H. J. Heinz Corp., 462 Pa. 111, 337 A.2d 907 (1975). There, in the course of holding that hearing loss resulting from protracted exposure to workplace noise was an accidental injury within the scope of the Workers' Compensation Act, the Supreme Court rejected the contention that an accident requires "a sudden and unexpected event" and adopted an **effects-based** test. Thus, the Supreme Court held "... the accident resides in the extraordinary nature of the effect rather than in the cause". Id. at 910.

USX's Petition for Rehearing and Petition for Rehearing En Banc was denied on May 8, 2006.

The Basis for Jurisdiction in the Court of First Instance

The District Court had jurisdiction based upon diversity of citizenship and the requisite amount in controversy. Such jurisdiction is within the scope of the judicial powers set forth in Article III, §2 of the United States Constitution as implemented by 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

I. STRICT ADHERENCE TO ERIE IS REQUIRED TO EFFECTUATE THE PRINCIPLES OF JUDICIAL FEDERALISM. YET, STATE LAW IS ALL TOO FREQUENTLY IGNORED OR MISAPPLIED BY COURTS OF APPEAL, WHO ARE AWARE THERE EXISTS NO EFFECTIVE CHECK ON THEIR ACTIONS.

In Erie Railroad Co. v. Tompkins, this Court acknowledged that federal courts had unconstitutionally usurped state judicial powers for more than a century and

made clear that, unless mandated by the Constitution or a federal statute, the law to be applied in all cases is the law of the states.

The significance of Erie in re-establishing judicial federalism is unquestioned. As Professors Wright and Kane put it,

> It is impossible to overstate the importance of the Erie decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the federal government and the states and returns to the states a power that had for nearly a century been exercised by the federal government.

Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 378 (6th ed. 2002).

But, if Erie is to retain its place as "... one of the most important cases at law in American legal history",[4] it must be given more than lip service by the lower federal courts. Near universal compliance with Erie's mandate that state law be applied in all cases not governed by the Constitution or a federal statute must be effectuated because

> Strict adherence to the principles of judicial federalism recognized in Erie is necessary to ensure that the political safeguards of federalism serve their intended function. Although the political safeguards of federalism limit the exercise of federal power by

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[4] Hugo L. Black, Address by Mr. Justice Black, 13 Mo. B.J. 173, 174 (1942).

> Congress and the President, these safeguards cannot similarly constrain lawmaking by federal courts because "the States are represented in Congress but not in the federal courts".

Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie, 145 U. Pa. L. Rev. 1459, 1489-1490 (1997).

Yet, while it is widely acknowledged that "strict adherence to Erie is required to effectuate the rebalancing of the state and federal judicial powers Erie sought to achieve, state law is all too frequently ignored, either through inadvertence or design, so that federal judges can reach what they deem to be the "best solution" even though that may be out of sync with the manner in which the state court would likely resolve the same issue. In the most extensive effort to quantify the extent to which lower federal courts adhere to the Erie mandate, the author found the results to be "... explicit and disquieting: the Erie decision is being frequently ignored or avoided." Moreover, the author found that tendency "to be a growing one" that "may now be reaching significant proportions." David A. Thomas, The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?", 1977 BYU L. Rev. 1, 2 (1978). Thus, after analyzing hundreds of diversity cases, the author concluded

> It appears that in a substantial proportion of diversity cases where state law should be applied—higher than one-third in one circuit—federal appellate courts may be failing or refusing to find and apply state law as rules of decision.... The consequences are the decline of state law as rules of decision—in essence, a possible return to the practice and problems of Swift v. Tyson—and the establishment of federal law

> superiority in an ever-increasing scope of legal activity, all at the expense of state law, state power, and possibly of functional federal balance.

Id. at 12. Professor Thomas found this failure to apply state law occurring "even where its application is obvious" and cautioned that this trend could "contribute heavily to the declining importance of state courts and state-created rights in this country." Id. at 24.

Similarly, in attempting to explain an empirically verified bias on the part of federal judges to cite federal precedents in cases governed by state law, Professors Landes and (now Circuit Judge) Posner concluded that

> ... [D]espite the principle of Erie R.R. v. Tompkins—that federal courts in diversity cases are bound to apply state decisional as well as statutory law—the federal courts continue to entertain a preference for federal interpretations of common law principles: **the federal common law survives despite its formal interment in the Erie decision**.

William M. Landes & Richard A. Posner, Legal Change, Judicial Behavior, and The Diversity Jurisdiction, 9 J. Legal Stud., 367, 375 (1980) (emphasis added). As illustrated by more recent law review comment, there is no indication this "explicit and disquieting" trend has reversed or even slowed.

The opportunities to ignore Erie are not isolated. More than 60,000 diversity cases are filed in federal courts each year; and, in a substantial number of those cases, federal courts will "create" rather than simply apply the governing legal right or duty. As candidly recognized by Circuit Judge Sloviter,

> When federal judges make state law—and we do, by whatever euphemism, one chooses to call it—judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function.

Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1687 (1992). That all too common practice both runs roughshod over Erie's mandate and "... results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate." Id. at 1671. Moreover, it encourages the very same types of forum shopping and causes the same inequitable administration of the laws that Erie found to be unwarranted and unconstitutional.

While this Court has made clear the lower courts are to apply the law of the states in diversity cases, it has provided only limited guidance as to how state law is to be determined when it is unclear or non-existent. Left to their own devices, most federal courts fashion a rule of law under the guise of "predicting" what the highest court of the state would do if presented with the same issue. Use of an unstructured predictive approach itself raises serious constitutional problems. As stated by Professor Clark,

> ... [T]he predictive approach runs counter to Erie's observation that "no clause in the Constitution purports to confer ... power upon the federal courts" to adopt "substantive rules of common law applicable in a State".... [W]hen federal courts fashion substantive rules of common law applicable in a state using the predictive approach, both the procedural and political mechanisms established by the Constitution to

> check the exercise of federal power are absent. For this reason, such lawmaking by federal courts—no less than independent judgment or general common lawmaking under Swift—"invade[s] rights ... reserved by the Constitution to the several states," especially the right of states to decide for themselves both **whether** and **when** to adopt the rule in question in the absence of controlling federal law.

Clark, *supra*, at 1501 (emphasis by author). The problems inherent in the predictive approach, and the opportunities it provides federal judges to "predict" state law in the way they think that law "ought to be", even if clearly contrary to what the state court would likely do, is vividly illustrated by this case.[5]

II. THE OPPORTUNITY THE "PREDICTIVE" APPROACH PROVIDES FOR AVOIDING APPLICATION OF STATE LAW AS IT EXISTS AND CREATING STATE LAW AS THE FEDERAL COURT THINKS IT "OUGHT TO BE" IS VIVIDLY ILLUSTRATED BY THIS CASE.

The instant case illustrates the opportunity the "predictive" approach provides for avoiding application of state law as it exists, and replacing it with that law the federal court thinks "ought to be". The Court of Appeals, in reversing the district court, ignored both the holding and policy basis of a directly

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[5] Judges of the Courts of Appeal are particularly vulnerable to the temptation to play "fast and loose" with state law since this Court's expressly stated reluctance to grant certiorari to correct errors in state law virtually assures their decisions will escape further review.

analogous decision of the state Supreme Court and, instead, applied the holding of an intermediate state court that has been expressly rejected by the state Supreme Court. In the process, the Court of Appeals shifted the financial responsibility for large numbers of negligently set in motion asbestos-related diseases with long latency periods from the insurers (where the Pennsylvania Supreme Court concluded it should rest) to the insureds.

The critical issue in this case is whether the injury each former USX employee is alleged to have sustained immediately upon exposure to asbestos was a bodily injury by accident. That issue was directly addressed by the Supreme Court of Pennsylvania in J. H. France, *supra*. There, the Supreme Court held that exposure to asbestos causes an immediate (i.e., within minutes) bodily injury, and made clear this injury is an accidental injury by deeming it sufficient to trigger the duty of all insurers to indemnify and defend the insured. The duty to defend and indemnify arose only if the bodily injury was caused by an "occurrence", which each policy expressly defined as meaning an "accident". Thus, there is no rational way to read J. H. France as holding anything other than that the initial injury each underlying claimant's decedent sustained when negligently exposed to asbestos containing products or premises was a "bodily injury by accident" as defined in the employers' liability policies Liberty Mutual alone drafted and issued to USX.

The Liberty Mutual employers' liability policy obligated it to defend and indemnify USX for claims of negligently caused "bodily injury by accident" **and expressly included within that term "such disease as results directly from a bodily injury by accident**." Because each of the underlying claimants alleged his/her decedent sustained an initial injury when negligently exposed to asbestos containing products or

premises; and because the uncontradicted medical evidence in the record (the affidavit of Dr. Sachs) establishes that the subsequently manifested asbestos-related diseases result directly from those initial injuries, the controlling issues in the instant case were squarely within the ambit of—and answered by—the Supreme Court's decision in J. H. France.

The issue was **not** whether the subsequently manifested asbestos-related **diseases** were accidentally caused bodily injuries—rather, the issue was whether the initial injury caused by the ingestion of asbestos fibers was an accidental bodily injury and, if so, whether it was that injury that set in motion and was the direct cause of the subsequently manifested asbestos-related disease. The Supreme Court (directly or inferentially) answered both issues in the affirmative in J. H. France and that Court's acceptance of the medical testimony given in that case as "scientific fact" was corroborated in the instant record by the uncontradicted affidavit of Dr. Sachs.

Nonetheless, the Court of Appeals deemed J. H. France to be "not germane to the issue before us" because the "... Pennsylvania Supreme Court addressed coverage under commercial general liability insurance policies, construing the terms 'bodily injury' and 'occurrence' rather than the terms at issue here."[6]

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[6] The panel's suggestion that what constitutes an accident for Commercial General Liability purposes differs from what constitutes an accident for Employers' Liability purposes is without merit. It is inconceivable that the Pennsylvania Supreme Court would conclude, and it has never indicated, that the medically verified discrete cellular injury that occurs immediately upon inhaling asbestos fibers is an accidental bodily injury when sustained by a third party but not when sustained by an employee

The Court of Appeals then determined (without citing any factual or legal authority for its conclusion) that contemporaneous industry usage made it "logical" to assume that the parties intended the term "accident" in the combined WC/EL policy to have the same meaning for both workers' compensation and employers' liability purposes,[7] and settled upon the definition of "accident" in Loudon v. H. W. Shaull & Sons, 13 A.2d 129, 130 (Pa. Super. 1940). There, more than a half century before, a Pennsylvania intermediate appellate court defined accident for purposes of the state's workers' compensation act as a "sudden and unexpected event" resulting in "a distinct happening or occurrence at a particular time." Although cited by counsel for USX at oral argument, the Court of Appeals ignored the fact that Loudon's definition of "accident" had been expressly rejected by the Supreme Court of Pennsylvania in Hinkle v. H. J. Heinz Corp., 462 Pa. 111, 337 A.2d 907, 910 (1975).[8] There, in

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freed of the barriers imposed by workers' compensation laws. Science is science, no matter what type of insurance policy is involved and no matter who the victim.

[7] There is not a scintilla of evidence in the record to support that statement. An insured could only be bound by usage if there was evidence it knew, or should have been aware, of the usage. Custom and usage is a fact that Liberty Mutual had the burden of proving. *See* Leslie v. Pennco, Inc., 323 Pa. Super 23, 470 A.2d 110 (1984); and Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 647 (3d Cir. 1958). Liberty Mutual presented no evidence whatsoever of custom or usage, or of the fact it was sufficiently pervasive so that it was known to parties outside the insurance industry.

[8] It should be noted that Hinkle was decided five years before Liberty Mutual ceased issuing employers' liability policies to USX, and that Liberty Mutual made no effort to change the definition of

holding that partial hearing loss sustained from protracted exposure to workplace noise was an accidental injury for workers' compensation act purposes, the Supreme Court expressly rejected the definition of accident relied upon by the panel and adopted an effect-oriented approach, stating that

> ... [W]here the work or act performed by the employee is ... not marked by any abnormal or unusual feature, but where there occurs an unexpected and unusual pathological result; ... *the accident resides in the extraordinary nature of the effect rather than in the cause"*.... This effect-oriented approach to the definition of what constitutes an accident is particularly applicable instantly since Hinkle does not allege that any one specific and traumatic occurrence precipitated the partial loss of hearing.

Thus, in "predicting" what the state Supreme Court would do, the panel predicted it would disregard its own precedents and revert to a holding of the state Superior court it had earlier rejected!

The panel's decision is both incompatible with the holding in J. H. France, and with the policy basis of that decision. By assuring that every insurer on the risk of a negligently caused latent disease from initial exposure to manifestation be financially responsible, the Pennsylvania Supreme Court made clear its intent was to prevent insurers from escaping liability

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"bodily injury-by accident" in the policies it issued during that period. That, too, refutes the panels' suggestion that the parties contracted with an assumption that the term accident was limited to "sudden" events resulting in a "distinct happening...at a particular time."

for a disease set in motion by an injury occurring during a policy period but which does not manifest itself until much later. As the Court of Appeals recognized in City of Erie, Pennsylvania v. Guaranty National Insurance Co., 109 F.3d 156, 164 (3d Cir. 1997):

> Courts adopted the multiple trigger in latent disease cases like asbestosis because the injuries caused by exposure do not manifest themselves until a considerable time after the exposure causing the injury.... Application of a first manifestation rule, it was feared, would allow insurance companies facing countless future claims to terminate coverage during asbestosis' long latency period. The entire burden of compensation would shift to the manufacturers even though the exposure causing injury occurred during the periods of insurance coverage.

What the Supreme Court sought to prevent in J. H. France is precisely what the panel permitted Liberty Mutual to do in the instant case.

The panel's statement that J. H. France is "not germane" to the instant case is, at best, misguided and at worse, specious. Moreover, if in fact the issue that is central to this case has not already been resolved by the Pennsylvania Supreme Court, Erie requires that the panel assure that so substantial a matter be resolved in a way that is consistent with both the letter and the policy of Pennsylvania law. That was not done in this case.[9] Instead, the panel went out of its

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[9] The remaining justifications the panel gives for circumventing J. H. France are also patently without merit and contrary to state law. The panel's suggestion that the term accident had to be given the

way to reach a result that by any measure appears to be out of sync with Pennsylvania law, and which can only be consistent with what the panel thought Pennsylvania law "ought to be". That is precisely what Erie sought to prevent.

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same meaning for purposes of Coverage A (workers' compensation) and Coverage B (employers' liability) because the policy contained a single definition applicable to both coverages is specious. What constitutes an accident for purposes of workers' compensation is completely governed by statute and judicial decisions interpreting the statute. An insurer cannot alter the coverage the Workers' Compensation Act mandates by inserting contrary definitions in the policy. Thus, the definition of "Bodily Injury by Accident" in the Liberty Mutual policies (whether in the combined Workers' Compensation/Employers' Liability policies or in the free-standing Employers' Liability policies it also marketed) can only apply to employers' liability coverage, and can have no applicability whatsoever to the workers' compensation coverage.

Similarly, the panel's statement that treating the injuries that occur immediately upon ingestion of asbestos fibers, as "bodily injury by accident" would render the definition of "bodily injury by disease" meaningless is simply inaccurate and supported by no evidence in the records or in medical annals. There are many diseases that, unlike asbestos-related diseases, are not preceded and set in motion by an initial accidental bodily injury. Negligently caused workplace stress that leads to hypertension and other cardio-vascular diseases are but one example. State law makes clear it is the job of an insurer, and not the court, to limit the coverage the insurer intends to provide. Moreover, the panel's decision severely limits the scope of the provision making such diseases as "result directly from a bodily injury by accident" bodily injuries by accident. This is diametrically contrary to Pennsylvania law, which mandates that coverage language be construed broadly, and exclusions narrowly.

III. RESPECT FOR THE PRINCIPLES OF JUDICIAL FEDERALISM REQUIRES THAT FEDERAL COURTS BE DENIED FREE REIGN TO "PREDICT" STATE LAW, AND THAT THERE BE A PRESUMPTION IN FAVOR OF CERTIFYING UNSETTLED OR UNANSWERED ISSUES OF STATE LAW TO THE HIGHEST STATE COURT.

This Court has made clear that federal court abstention is not warranted simply because the state law is unclear or non-existent. Thus, the only feasible ways to avoid the constitutionally questionable use of the predictive approach and yet comply with Erie's mandate that state law govern is for federal courts to adopt a "static" approach—i.e., to refuse to create any law to fill a gap in the state law—or to certify the issue to the highest court of the state. The "static" approach, while avoiding some of the constitutional concerns inherent in the "predictive" approach encourages forum shopping in cases in which a state court would likely create new law but has not yet done so. This is unfair to litigants who stand to benefit from newly created rights or duties. Thus, the only method for filling gaps in state law that can withstand constitutional scrutiny, prevent forum shopping, and result in the equitable administration of the laws is for a federal court to certify unsettled or unanswered issues of state law to the state court.

This Court acknowledged the benefits and encouraged the use of certification in Lehman Brothers v. Schein, 416 U.S. 386 (1974). There, in vacating the Second Circuit's "prediction" as to the manner in which the Florida courts

would resolve an unsettled question of Florida law,[10] and remanding so that the Court of Appeals could "reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court," this Court acknowledged that certification "...does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." 416 U.S. at 391.[11]

However, perhaps because at that time a majority of the states had no procedures for effectuating certification, this Court refused to make resort to certification obligatory. Nonetheless, the fact that this Court granted certiorari, vacated the Court of Appeals' judgment, and remanded for the sole purpose of "reconsidering" whether the issue should be certified to the Florida Supreme Court is significant. As recognized by Professor Clark,

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[10] A "prediction" later flatly rejected by Florida Supreme Court. *See* Schein v. Chasen, 313 So.2d 739, 747 (Fla. 1975).

[11] *See* also Arizonans for Official English v. Arizona, 520 U.S. 43, `76-77 (1997). There, contrasting certification with Pullman abstention, this Court said:

> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response....
>
> ....
>
> Through certification...a federal court may save "time, energy, and resources and **hel[p] build a cooperative judicial federalism**." (Emphasis added.)

> The court's action was significant because the case presented no question of federal law, constitutional or otherwise. Rather, the only question before the Court was whether the defendants could be held liable to the plaintiffs under Florida law. Thus, the Court's interest in encouraging certification in cases like Lehman Brothers appears to rest solely on judicial federalism grounds.

Clark, *supra*, at 1547.

Encouraging, but not obligating, the use of certification to resolve substantial unsettled or unanswered issues of state law was a significant step forward. But, to achieve the degree of compliance with Erie's mandate required to effectuate the goal of judicial federalism, it is necessary to "push that envelope farther" and create a presumption in favor of certification-i.e., to require that unsettled or unanswered issues of state law that have substantial policy effect and directly affect outcome be certified **unless** the federal court can set forth compelling reasons why certification would be inappropriate (such as substantially increased and unwarranted expense or delay that would unduly burden one of the litigants).

Today, nearly every state permits either all federal courts or the federal Courts of Appeal to certify issues of state law to the highest state court.[12] Where such a procedure exists,

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[12] 19 Charles Alan Wright et al., Federal Practice and Procedure §4507 n. 57 (2d ed. 1996). *See* also Clark, *supra*, at 1548 n. 472, where the author cites the code sections of 43 states, the District of Columbia and Puerto Rico authorizing certification. Since the date of that listing, California, Missouri, Pennsylvania, and Vermont have promulgated rules authorizing at least some federal courts (i.e., both the district courts and the courts of appeals or just the

and where a definitive answer to the issue can be obtained from the only source authorized to create state common law, there no longer exists any justification for permitting a federal court to "predict" what the state would do. Certification assures that federal courts will not invade rights the Constitution reserves to the states. Moreover, it permits judges selected in the manner the State and its citizens have established to render those decisions that will impact the lives and pocket books of state citizens. As stated by Professor Clark

> Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in Erie. By allowing state, rather than federal, courts to supply "an authoritative response" in the very case in which an unsettled question of state law arises, certification ensures that states—acting through agents of their choice—rather than federal courts will exercise the "sovereign prerogative of choice" inherent in the resolution of unsettled questions of state law. In this way, certification permits what Erie says the Constitution requires—that "the voice adopted by the state as its own" will "'utter the last word'" on matters governed by state law.... Thus, unlike prediction, certification

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courts of appeals) to certify issues of state law. *See* also the listing in Rebecca A. Cochran, Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study, 29 J. Legis. 157 app. A at 223 (2003), Pennsylvania will accept certification from the U.S. Supreme Court or any U.S. Court of Appeals. *See* Internal Operating Procedures of the Pennsylvania Supreme Court, by Order of Jan. 12, 2000, 30 Pa. Bull. 519 (January 29, 2000). The rule expressly permits courts to file a certification petition *sua sponte*.

> ensures that federal courts will not "invade [] rights... reserved by the Constitution to the several States" by "declar[ing] substantive rules of common law applicable in a State."

Clark, *supra*, at 1550.[13]

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[13] For additional comment on the problems created by the "predictive" approach, and the benefits of certification, *see* L. Lynn Hogue, Law in a Parallel Universe: Erie's Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform, 11 Ga. St. U. L. Rev. 531 (1995). In the course of arguing that "Erie's promise has been betrayed" by the use of the predicative approach, Professor Hogue writes:

> **Although Erie and Klaxon impose an obligation to follow state law, they provide no effective mechanism to resolve the practical problems of state law administration.** What are federal courts to make of state law issues that are obscure because state-law precedent on point is lacking or because state courts have never spoken to the issue presented? The answer in such instances is that the federal judge must "speculate" in an effort to "predict state law." **These speculations are only imperfectly subject to correction since there is no possibility of further review because of the absence of a federal question. As a consequence, federal district courts and courts of appeals can develop separate and distinct bodies of state law—true state law enforced in state court and an ersatz federal version of state law enforced in federal court. This legal dualism—making the version of the law applied in a case turn on the courthouse-was of the sort that Erie was supposed to end.** Id. at 532 (emphasis added).

In the heyday of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), a prominent lawyer complained that the federal court "'... would recognize a state court's sovereignty on matters of state law only if the decision were not contrary to what that Court thought the law 'ought to be.'" Sloviter, *supra*, at 1675.[14] The absence of a presumptively applicable mechanism enabling state courts to provide the answer to substantial state-law issues that arise in federal diversity cases, coupled with this Court's often stated admonition that "... standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review",[15] has emboldened far too many federal jurists to do as the state would likely do only when doing so is consistent with what the judge "thought the law 'ought to be.'" That trend, and the slide back toward the days of Swift v. Tyson it effectuates, can only be reversed, and Erie's mandate fulfilled, if a presumption in favor of certification is established by this Court.

As is all too often true of cases in which Courts of Appeal "predict" state law, the issues and policy implications of this case are significant and far-reaching. Whether Employers' Liability policies are to be interpreted by precedents applicable to workers' compensation policies or by precedents applicable to all other types of liability policies will determine whether insurers or employers bear the costs of defending and

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[14] Judge Sloviter attributes the quotation to George Wharton Pepper, The Border Land of Federal and State Decisions 23-25 (1889).

[15] Haring, Lieutenant, Arlington County Police Department v. Prosise, 462 U.S. 306, 314 n. 8 (1983).

indemnifying innumerable claims.[16] Once the Court of Appeals concluded that "... the Supreme Court of Pennsylvania has not considered the precise issue before us", it should have resisted the urge to "predict" what that court would do and certified the issue to the Pennsylvania Supreme Court. Instead, the Court of Appeals rendered a prediction that is out of sync with a directly analogous decision of the Supreme Court of Pennsylvania, with the policy basis of the Supreme Court's decision, and which relies upon older precedents that have since been expressly disavowed by the Pennsylvania Supreme Court.[17] This is truly a case in which

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[16] It is particularly appropriate that state, and not federal, courts resolve substantial questions of law applicable to insurance. *See* the McCarran-Ferguson Act, Mar. 9, 1945, ch 20, §1, 59 Stat. 33, 15 U.S.C. §1011 where, in an express declaration of policy, it is provided that

> "Congress hereby declares that the continued regulation ... by the several States of the business of insurance is in the public interest...."

[17] Some of the more obvious dangers of the predictive approach, and a plea for use of certification, are illustrated by Judge Becker's dissent in Hakimoglu v. Trump Taj Mahal Associates, 70 F.3d 291 (3d Cir. 1995). There, in recommending that New Jersey adopt a certification procedure, Judge Becker said:

> This case is its own best evidence ... of the utility of a certification procedure.... [I]n cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel. Meanwhile, federal judges, by no means a high-rolling bunch, are put in the uncomfortable position of making a choice. In effect, we are forced to make important state policy, in contravention of basic federalism principles.... The possibility that

the Court of Appeals, confident its decision would escape further review, made little effort to decide the issue as the Pennsylvania Supreme Court would and, instead, rendered a decision based on what it thought the state law "ought to be". Such a disregard for Erie, and for the concepts of judicial federalism that decision sought to effectuate, can only be avoided if federal courts are compelled to certify significant issues of unsettled or unanswered state law to the highest court of the state.

CONCLUSION

Petitioner respectfully requests that this Court go farther than simply encouraging the use of certification, and create a presumption in favor of certification that can be circumvented only by a showing of cause.[18] The minimal delay or

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> federal courts may make interpretive assumptions that differ from those of the state court further complicates this process. States ... lacking certification procedures face the threat that federal courts will misanalyze the state's law, ... by inadvertently viewing it through the lens of their own federal jurisprudential assumptions.

70 F.3d at 302. Judge Becker deemed certification to be essential when, as here, "(1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent through which the federal court could resolve the issue." Id. at 304. Circuit Judges Nygaard and (now Justice) Alito expressed their agreement with the recommendations contained in this portion of Judge Becker's dissent. Id. at 302 n. 9.

[18] Rather than mandating increased use of certification by federal judges, the Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the

inconvenience such a procedure could possibly cause would be more than offset by the respect for judicial federalism that results, and by the return of Erie to its rightful status as "one of the most important cases at law in American legal history".

Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted, that the decision of the Court of Appeals for the Third Circuit be vacated, that this Court create a presumption in favor of certification, and that this matter be remanded to the Court of Appeals for the Third Circuit with orders to certify the issue of whether employers' liability policies are to be interpreted in accordance with those precedents applicable to all other liability insurance policies or by the now rejected workers' compensation precedents relied upon by the Court of Appeals to the Supreme Court of Pennsylvania.

Federal Courts, Recommendation 8 at 32 (2d prtg. 1995), **encourages states** to adopt certification procedures. That alone will not assure that the respect for judicial federalism Erie mandates is achieved. A (rebuttable) presumption in favor of certifying substantial-case determinative issues of state law will both assure that certification is used wisely and minimize the incursions on state judicial sovereignty that too frequently occurs when federal judges "predict" controlling issues of state law.

For an overview of the manner in which the certification process has been used, and of judicial attitudes toward certification, see generally Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice (American Judicature Society 1995).

Absent from both those sources is an in depth consideration of the fact that, when "predicting," state law, federal judges are undertaking a function Erie concluded the Constitution reserves to the states. More than slight inconvenience should be required to condone such a usurpation of state judicial powers.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 04-1277 and 04-1300

[Filed May 8, 2006]

USX CORPORATION	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
Appellant in No. 04-1277	)
	)
USX CORPORATION,	)
Appellant in No. 04-1300	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 01-00889)
Honorable Donald E. Ziegler, Chief Judge,
and Honorable Terrence F. McVerry, District Judge

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, and ROTH, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES and GREENBERG, Circuit Judges, and BUCKWALTER, District Judge*

The petition for rehearing filed by appellee/cross-appellant, USX Corporation, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc the petition for rehearing is denied. Judge Greenberg's vote and Judge Buckwalter's vote are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: May 8, 2006

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* Honorable Ronald L. Buckwalter, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 04-1277 and 04-1300

[Filed April 10, 2006]

USX CORPORATION	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
Appellant in No. 04-1277;	)
	)
USX CORPORATION,	)
Appellant in No. 04-1300	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY	)
	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 01-00889)
Honorable Donald E. Ziegler, Chief Judge,

and Honorable Terrence F. McVerry, District Judge*

BEFORE: ROTH and GREENBERG, Circuit Judges, and BUCKWALTER, District Judge**

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before the court on an appeal by defendant Liberty Mutual Insurance Company ("Liberty Mutual") from an order of the district court entered on June 27, 2002, granting partial summary judgment in favor of plaintiff USX Corporation ("USX") on its contract claims arising out of Liberty Mutual's refusal to defend and indemnify USX in various actions brought against it under a Workmen's Compensation/Employers' liability policy ("WC/EL policy") that Liberty Mutual had issued to USX.[1] Liberty Mutual also appeals from the final judgment entered

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* Chief Judge Ziegler entered the June 27, 2002 order, adopting the magistrate judge's Report and Recommendation, and Judge McVerry entered the final judgment on January 9, 2004.

** Honorable Ronald L. Buckwalter, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] Although this action implicates multiple policies, inasmuch as the issue before us is the same under all the policies we refer to the action as though it involves a single policy. In this regard we note that the magistrate judge in her Report and Recommendation that became the district court's opinion sometimes referred to all the policies singularly.

in favor of USX on January 9, 2004. The case is also before us on a cross-appeal that USX filed from the portion of the district court's order of June 27, 2002, granting Liberty Mutual partial summary judgment and the judgment entered on January 9, 2004, in favor of Liberty Mutual on USX's claim charging bad faith denial of insurance coverage. For the reasons we set forth below, we will reverse the order of June 27, 2002, and the judgment of January 9, 2004, to the extent that they are in favor of USX and will affirm the order and judgment to the extent that they are in favor of Liberty Mutual. Furthermore, we will remand the case to the district court to enter a final summary judgment in favor of Liberty Mutual on the portions of the summary judgment that we are reversing.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Relevant Insurance Contract

USX is a Delaware corporation with its principal place of business in Pennsylvania, and Liberty Mutual is a mutual insurance company founded by an act of the Massachusetts Legislature with its principal place of business in that state.[2] In 1912, Liberty Mutual issued to USX a standard form WC/EL policy, which the parties annually renewed until January 1, 1980.[3] Although issued in Pennsylvania, the WC/EL policy provided coverage to USX for specified

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[2] The facts relevant to our decision are undisputed, and we refer to the Joint Appendix filed by counsel as "J.A."

[3] Only the period between January 1, 1952 and January 1, 1980, is at issue. The parties have settled their dispute regarding coverage before January 1, 1952.

operations in identified states, including some USX operations in Texas.

The WC/EL policy had two parts: "Coverage A- Workmen's Compensation" ("Coverage A") provided coverage for USX's statutory liability for workmen's compensation claims; and "Coverage B- Employers' Liability" ("Coverage B") provided coverage for liability that the exclusivity provisions of the applicable workmen's compensation statute did not bar. Thus, ordinarily, at least, Coverage B covered workmen's claims that were not based on no fault workmen's compensation statutory provisions.[4] The portion of the WC/EL policy most germane to this appeal is Coverage B, which covered "all sums which [USX] shall become legally obligated to pay as damages because of bodily injury by accident or disease[.]" J.A. at 662. The WC/EL policy contained a single "Definitions" section, applicable to both Coverage A and Coverage B, containing the following definition:

> Bodily Injury by Accident; Bodily Injury by Disease
> The contraction of disease is not an accident within the meaning of the word 'accident' in the term 'bodily injury by accident' and only such disease as results directly from a bodily injury by accident is included within the term 'bodily injury by accident.' The term 'bodily injury by disease' includes only such disease as is not within the term 'bodily injury by accident.'

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[4] Coverage B claims usually, if not always, are predicated on common law principles as sometimes modified by statute. *See, e.g.*, N.J. Stat. Ann. §§ 34:15-1 to 6 (West 2000).

J.A. at 662.[5] The policy did not define "accident" or "disease."

While Coverage B insured USX for damages resulting from either "bodily injury by accident" or "bodily injury by disease," there was a notable limitation on the latter coverage in that the policy did not cover a claim for "bodily injury by disease" "unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages[.]" J.A. at 662. This thirty-six-month claim limitation period, by its terms, applies only to claims for "bodily injury by disease." J.A. at 662.

B. The Underlying Complaints and the Claim for Coverage

Beginning in 1990, certain of USX's former employees and their survivors filed hundreds of non-workmen's compensation actions against USX in Texas, seeking damages for injuries sustained by the former employees while allegedly being exposed to asbestos products and/or asbestos-contaminated premises.[6] On June 27, 1997, seven years after

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[5] At oral argument, counsel for USX suggested that the quoted definition did not apply to both Coverage A and Coverage B. We disagree and note that the WC/EL policy uses the limiting phrase "Under coverage A" when limiting application of a provision to Coverage A or the phrase "Under coverage B" when limiting application of a provision to Coverage B. The definition for "Bodily Injury by Accident; Bodily Injury by Disease" does not contain any such limiting phrase.

[6] The employees' claims against their employer USX are not barred in Texas which permits the additional recovery of exemplary damages against an employer in wrongful death cases, where gross negligence or intentional misconduct is shown. Tex. Lab. Code

the former employees and their survivors filed the initial asbestos-related lawsuits against USX, USX sought coverage for defenses and indemnification from Liberty Mutual in the underlying actions. By letter dated February 28, 1998, from its in-house coverage counsel, Liberty Mutual denied USX's claim for coverage, explaining that there was no potential coverage and citing, inter alia, the thirty-six-month claim limitation provision.

C. The Proceedings in the District Court

In response to the Liberty Mutual disclaimer, USX filed this diversity of citizenship action on May 18, 2001, against Liberty Mutual in the district court asserting a claim for breach of insurance contract (Count I), seeking a declaratory judgment that there was coverage (Count II), claiming insurance bad faith under 42 Pa. Const. Stat. Ann. § 8371 (West 1998) (Count III), seeking indemnity (Count IV), and asking for contract reformation (Count V). In sum, USX alleged that the policy covers asbestos-related claims because they are for "bodily injury by accident," to which the thirty-six-month claim limitation provision does not apply, or, in the alternative, that the contract should be reformed as it "defeated the reasonable expectations of [USX] and is thus contrary to public policy." *See* J.A. 52. The district court referred the case to a magistrate judge under 28 U.S.C. §§ 636(b)(1)(A) and (B).

On October 1, 2001, Liberty Mutual filed a motion for summary judgment. As with its initial denial of coverage, Liberty Mutual asserted that the policy did not cover the

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Ann. § 408.001(b) (Vernon 2005). The plaintiffs named additional defendants in the actions, but we need not list them.

underlying claims because they were for "bodily injury by disease" and thus the thirty-six-month claim limitation provision precluded coverage for them inasmuch as the plaintiffs did not file their actions within thirty-six months following the end of the policy period.[7] On February 21, 2002, USX filed a cross-motion for summary judgment as to Counts I-IV.

The magistrate judge to whom the court referred the case issued a Report and Recommendation on May 15, 2002, recommending that the court grant summary judgment in favor of USX on its claims for breach of contract, declaratory relief and indemnity (Counts I, II, and IV, respectively), but that the court grant summary judgment in favor of Liberty Mutual on the insurance bad faith claim (Count III). The magistrate judge concluded with regard to Counts I, II and IV that the definition of "bodily injury by accident" was ambiguous and consequently recommended that the court construe it in favor of USX as the insured.

The magistrate judge in reaching her conclusion relied on the Pennsylvania Supreme Court opinion in *J.H. France Refractories Co. v. Allstate Insurance Co.*, 534 Pa. 29, 626 A.2d 502 (Pa. 1993), for the proposition that "exposure to asbestos causes immediate 'bodily injury' under the terms of an insurance policy that offers coverage for 'bodily injury.'" J.A. at 8. In light of this immediate bodily injury, the magistrate judge reasoned that because "no one intends to inhale asbestos fibers and develop asbestosis," "the injury [therefore] occurs by an accident that later results in a

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[7] USX does not assert that any of the plaintiffs made a written claim or brought a suit against USX prior to thirty-six months after the end of the policy period.

disease." J.A. at 13. According to the Report and Recommendation, this circumstance raises at least a "reasonable interpretation" that the underlying claims were for "bodily injury by accident" and thus the Liberty Mutual policy covered USX against them. J.A. at 11, 13. In view of the magistrate judge's recommendation with respect to the meaning of the policy, she recommended that the court dismiss Count V seeking reformation as moot. The magistrate judge, however, recommended that the court grant summary judgment in favor of Liberty Mutual on Count III because she believed that Liberty Mutual "demonstrated a reasonable basis for its refusal to defend and indemnify USX," specifically its reliance on authority from another jurisdiction in the absence of applicable precedent from the courts of Pennsylvania. J.A. 17.

Both parties filed timely objections to the magistrate judge's Report and Recommendation, following which the district court, after a de novo review, issued an order on June 27, 2002, which adopted the Report and Recommendation as the opinion of the court and dismissed Count V as moot.[8] Subsequently, the parties agreed that Liberty Mutual as a result of the June 27, 2002 order, owed USX $2,200,000, subject to Liberty Mutual's right to appeal, for attorneys' fees, defense costs, and pre-judgment interest. The court then entered a final judgment on January 9, 2004, in favor of USX on Counts I, II, and IV and in favor of Liberty Mutual on Count III.[9] The January 9, 2004 judgment included an award

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[8] Because the district court adopted the magistrate judge's Report and Recommendation, we will refer to the adopted opinion as that of the district court.

[9] In its final judgment of January 9, 2004, the district court stated that "[t]he parties have settled and finally resolved all other claims

of $2,200,000. Thereafter both parties timely filed notices of appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The district court exercised diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332, and we have jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 1291. We exercise plenary review of the order granting summary judgment. *See Dilworth v. Metro. Life Ins. Co.*, 418 F.3d 345, 348 (3d Cir. 2005); *Haugh v. Allstate Ins. Co.*, 322 F.3d 227, 230 (3d Cir. 2003). We will affirm an order granting summary judgment if our review reveals that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the facts in the light most favorable to the party against whom summary judgment was entered. *See Dilworth*, 418 F.3d at 349; *Haugh*, 322 F.3d at 230. The parties agree that Pennsylvania law governs this action.[10]

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and issues between them, except that each has reserved the right to appeal their respective adverse decision of the Court." J.A. at 35.

[10] We note that USX in its brief asserts that the materials submitted to Liberty Mutual's in-house coverage counsel were not adequate for counsel to know "that the coverage issue was governed by Pennsylvania law; nor indeed any knowledge as to what law governed the insured's demand for indemnity and a defense." Cross-Appellant's br. at 8. We are perplexed by this implicit criticism inasmuch as USX agrees that Pennsylvania law is applicable here.

IV. DISCUSSION

A. Appeal by Liberty Mutual

In asserting that the district court should have entered summary judgment in its favor on Counts I, II and IV, rather than in favor of USX, Liberty Mutual argues that the court erred in concluding that the policy language at issue was ambiguous. Liberty Mutual submits that, when viewed in the context in which the parties made the contract, the only reasonable interpretation of the policy is that the underlying asbestos-related claims are not claims for "bodily injury by accident" but instead are claims for "bodily injury by disease," to which the thirty-six-month claim limitation period applies. In particular, Liberty Mutual asserts that the district court's analysis ignored a substantial body of Pennsylvania workmen's compensation law defining the term "accident" which necessarily informs the employers' liability coverage at issue inasmuch as it was written in a single policy also providing workmen's compensation coverage. Of course, in light of the circumstance that the Texas plaintiffs brought the underlying actions well beyond the expiration of the thirty-six-month claim limitation period and did not make written claims within that period, if Liberty Mutual is correct it owes no duties to USX on the WC/EL policy involved here.

USX counters that the meaning of the disputed policy language should be ascertained by reference to *J.H. France Refractories* and that "the workers' compensation precedents upon which Liberty Mutual almost exclusively relies have no relevance." Appellee's br. at 26 (emphases in original). Thus, in USX's view, this case involves underlying claims for "bodily injury by accident" to which the thirty-six-month claim limitation period does not apply. Our review of the

materials submitted and the relevant authorities leads us to agree with Liberty Mutual.

The district court was, of course, correct to the extent that it observed that in Pennsylvania a court construes ambiguities in an insurance policy strictly against the insurer. *See, e.g.*, *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 n.3 (3d Cir. 1998) (citing *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 503 Pa. 300, 469 A.2d 563, 566 (Pa. 1983)). Nevertheless, in Pennsylvania, and no doubt elsewhere, "[c]lear policy language . . . is to be given effect, and courts should not torture the language to create ambiguities but should read the policy provisions to avoid it." *Selko*, 139 F.3d at 152 n.3 (internal citations and quotation marks omitted). In construing policy language, courts should consider any special usage "[w]here terms are used in a contract which are known and understood by a particular class of persons in a certain special or peculiar sense[.]" *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 781 A.2d 1189, 1193 (Pa. 2001).[11]

While the terms "disease" and "accident" do not appear alongside the definitions of "bodily injury by disease" and "bodily injury by accident," Liberty Mutual correctly argues

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[11] The Pennsylvania Supreme Court explained in *Sunbeam* that "[t]he parol evidence rule does not apply in its ordinary strictness where the existence of a custom or usage to explain the meaning of words in a writing is concerned," and that an ambiguity need not be shown before looking to usage. 781 A.2d at 1193 (citing Restatement (Second) of Contracts §§ 202(5), 220 cmt. d (1979)). Instead, absent an express provision to the contrary, "custom or usage, once established, is considered a part of a contract and binding on the parties though not mentioned therein, the presumption being that they knew of and contracted with reference to it." 781 A.2d at 1193.

that the meaning of those terms with respect to employers' liability under Coverage B in the policy at issue is informed by their usage in the closely related context of workmen's compensation claims. Carriers write insurance for both types of claims to cover claims arising out of employee workplace injuries.[12] Accordingly, as one leading treatise explains,

> workers' compensation is routinely written in combination with an employer's liability policy to provide protection for those situations where worker's compensation may not apply and thus avoid a gap in protection because employee claims subject to workers' compensation law are generally excluded in other types of liability policies.

7B John Allan Applebaum, *Insurance Law and Practice* § 4571, at 2 (Berdal ed. 1979). Courts of last resort in several states have observed, consistently with this explanation, that "employers' liability insurance is traditionally written in conjunction with workers' compensation policies." *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal. 3d 903, 718 P.2d 920, 927, 226 Cal. Rptr. 558 (Cal. 1986); *see also Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 784 n.7 (Fla. 2004); *Schmidt v. Smith*, 155 N.J. 44, 713 A.2d 1014, 1017 (N.J. 1998). Such is the case here where the employers' liability coverage at issue is part of a WC/EL policy containing a single "Definitions" section applicable to both Coverage A and Coverage B. Accordingly, although to the best of our knowledge the Supreme Court of Pennsylvania has not considered the precise issue before us, we predict that it

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[12] Even though we refer to "workplace" injuries we are well aware that some employee injuries are within the scope of workmen's compensation laws though they occur away from the workplace.

would look to the substantial body of workmen's compensation precedent to inform its construction of the terms "disease" and "accident" in a related employers' liability policy, such as the one involved here.[13] After all, it is logical that the contracting parties would not use the term "accident" in a WC/EL policy intending the term to have one meaning under Coverage A and another under Coverage B, when the coverages are written in conjunction and are set forth in a single document with one set of definitions.

At the time the parties entered into the policy at issue, the term "accident" had a special meaning based on its usage in the context of workmen's compensation. Inasmuch as the Pennsylvania Workmen's Compensation Act ("WCA"), as the legislature originally enacted it in 1915, provided benefits only for injury or death resulting from an "accident" in the course of employment but did not define "accident," the courts fashioned a definition of that term. *See Pawlosky v. Workmen's Comp. Appeal Bd. (Latrobe Brewing Co.)*, 514 Pa. 450, 525 A.2d 1204, 1208 (Pa. 1987). The courts defined the term "accident" as a "sudden and unexpected event," with "[a] sudden event impl[ying] a distinct happening or occurrence at a particular time." *Loudon v. H.W. Shaull & Sons*, 140 Pa. Super. 106, 13 A.2d 129, 130 (Pa. Super. Ct. 1940) (internal citation and quotation marks omitted). *Loudon* is instructive because it involved a claimant who sought compensation after contracting typhoid from contaminated

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[13] None of the parties or the amici curiae has cited a Pennsylvania Supreme Court or Superior Court case dealing with the precise issue before us, and in our research we have not found one. But we are obliged to predict how the Supreme Court of Pennsylvania would rule on the issue. *See Monaco v. Am. Gen. Assurance Co.*, 359 F.3d 296, 303 (3d Cir. 2004); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 486 (3d Cir. 1997).

drinking water. In differentiating between an "accident" and a "disease," the court in *Loudon* adopted the following language from *Matter of Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366, 367 (N.Y. 1925):

> Germs may indeed be inhaled through the nose or mouth or absorbed into the system through the normal channels of entry. In such cases their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time. . . . For this reason as well as for the reason that absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease and not an accident.

Id. at 132 (internal citation omitted); *see also Ciabattoni v. Birdsboro Steel Foundry & Mach. Co.*, 386 Pa. 179, 125 A.2d 365, 368 (Pa. 1956) (defining accident as "a definite happening or occurrence or event of which the employee is almost invariably aware," as distinguished from an occupational disease, which "is latent and insidious and the resultant disability is often difficult to determine"). Employing this contemporaneous industry usage of the terms "accident" and "disease," we conclude that the only reasonable interpretation of the term "bodily injury by accident" excludes the underlying claims for asbestos-related diseases.[14]

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[14] We are mindful that the Pennsylvania legislature has made revisions to the WCA, including, inter alia, replacement of the term "accident" with the term "injury." *See Pawlosky*, 525 A.2d at 1208-09. We have considered the revisions and have concluded that they do not affect our analysis. We also are aware that the legislature has adopted the Occupational Disease Act, *see* 77 Pa. Stat. Ann. § 1201 *et seq.* (West 2002), which includes asbestos-

Accordingly, we reject the district court's contrary conclusion that the type of injuries involved in the underlying actions "occur[] by an accident that later results in a disease" because "no one intends to inhale asbestos fibers and develop asbestosis." J.A. at 13. To us, at least, it is clear that the district court's conclusion under the policy at issue contravenes the usage of the term "accident," and renders certain policy provisions essentially meaningless. Most notably, under the district court's conclusion the term "bodily injury by disease" would be practically meaningless inasmuch as nearly every microscopic injury resulting from indeterminate, generalized exposure to an agent would be considered a "bodily injury by accident" because no one intends to be injured. *See Riverwood Int'l Corp. v. Employers Ins. of Wausau*, 420 F.3d 378, 383 (5th Cir. 2005); *Hubbs v. Anco Insulations, Inc.*, 747 So. 2d 804, 807-08 (La. Ct. App. 1999).

We also are of the view that the district court's construction effectively would read out of the policy the "Definitions" clause which recites that "[t]he contraction of disease is not an accident within the meaning of the word 'accident' in the term 'bodily injury by accident.'" *See* J.A. at 662. Pennsylvania courts long have admonished that "contract terms will not be construed in such a manner so as to render them meaningless," *Girard Trust Bank v. Life Ins. Co. of N. Am.*, 243 Pa. Super. 152, 364 A.2d 495, 498 (Pa. Super. Ct. 1976), and we decline to do so here. Lastly, the district court's construction would produce an anomalous result in which the term "bodily injury by accident," as used

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related diseases among its list of enumerated "occupational diseases," *id.* at § 1208. This law, like the revisions to the WCA, does not affect our analysis.

by the parties in the WC/EL policy, means one thing under Coverage A but something else under Coverage B, despite its inclusion in a single definition section applicable to both.

The decision in *J.H. France Refractories*, 534 Pa. 29, 626 A.2d 502, on which USX primarily relies, is not germane to the issue before us. USX asserts that in *J.H. France Refractories*, "the Pennsylvania Supreme Court accepted as a scientific fact that exposure to asbestos causes an immediate bodily injury and that it is that injury that leads to and causes the subsequent asbestos-related disease." Appellee's br. at 25 (emphases in original).

The issue here, however, is not whether asbestos exposure causes an injury, a proposition that Liberty Mutual does not dispute, but is instead whether the underlying claims for asbestos-related injuries are claims for "bodily injury by accident" or "bodily injury by disease." *J.H. France Refractories* does not provide guidance on this question because in that case the Pennsylvania Supreme Court addressed coverage under commercial general liability insurance policies, construing the terms "bodily injury" and "occurrence" rather than the terms at issue here.[15] Unlike workmen's compensation policies, general liability insurance policies are not written in conjunction with employers' liability policies. Indeed, while workmen's compensation policies and employers' liability policies both address claims arising out of employee workplace injuries, commercial

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[15] Indeed, notwithstanding the district court's grant of partial summary judgment in favor of USX, it recognized that *J.H. France Refractories* was not controlling as it "[did] not hold that the inhalation of asbestos fibers is an immediate accidental injury, but only that such exposure constitutes an immediate bodily injury." J.A. at 16 (internal quotation marks omitted).

general liability policies generally exclude injuries to some, if not all, employees from coverage. *See* 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 129:10 (3d ed. 2005). Therefore, inasmuch as *J.H. France Refractories* involved a commercial general liability policy and construed terms materially different than those at issue here, the district court's and USX's reliance on that case is misplaced.

Finally, on the policy construction issue we observe that our conclusion is consistent with that reached by other courts. *See Riverwood*, 420 F.3d at 378; *Hubbs*, 747 So.2d at 804. In *Riverwood* and *Hubbs* the courts concluded that terms identical to those here in standard employer's liability policies were subject to only one reasonable interpretation – that an asbestos-related injury is not a "bodily injury by accident" under the policies. 420 F.3d at 382; 747 So.2d at 807-08. The courts agreed that to find otherwise "would be to subsume the definition of bodily injury by disease into the definition of bodily injury by accident." *Hubbs*, 747 So.2d at 807-08; *Riverwood*, 420 F.3d at 383.[16] We realize that those cases are not binding on the Pennsylvania courts nor on this court when applying Pennsylvania law. Nevertheless we find their construction of identical terms in standard employers' liability policies to be persuasive and to comport with our understanding of the plain meaning of the policy at issue here.

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[16] We note further that the Court of Appeals for the Fifth Circuit in *Riverwood* similarly looked to the applicable body of state workmen's compensation case law to discern the industry usage of the term "accident." *See* 420 F.3d at 383.

B. Cross-appeal by USX

As a preliminary matter on the cross-appeal, we address Liberty Mutual's pending motion to strike portions of what USX styles as its "Reply Brief on Behalf of Appellee/Cross-Appellant, USX Corporation." Specifically, Liberty Mutual moved to strike those portions of the brief that address issues related to Liberty Mutual's appeal but are outside of the scope of USX's cross-appeal. Liberty Mutual's motion is meritorious as the inclusion of these portions in the brief contravenes Fed. R. App. P. 28(c), which provides that "[a]n appellee who cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal." Moreover, Rule 28(c) does not allow the cross-appellant to use its reply brief as a sur-reply to the appellant's opening brief. *See Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 526 (5th Cir. 2002); *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1092 (10th Cir. 2001) ("If the latter portion of [cross-appellant's] 'Reply Brief' had been submitted to the Clerk of Court under the correct title, 'Appellee's Sur-Reply Brief,' it would not have been accepted for filing."). Because USX's opposition to the motion to strike lacks merit, we grant Liberty Mutual's motion to strike those portions of the reply brief related to issues that USX did not appeal.[17]

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[17] We have written at length on this briefing matter to give guidance to the bar. While there is no doubt but that USX legitimately filed its cross-appeal, we point out that the situation here is similar to that when an appellee files an unnecessary cross-appeal when it seeks only an affirmance of the district court order, *see, e.g.*, *Kontakis v. Beyer*, 19 F.3d 110, 112 (3d Cir. 1994), and thereby sets up a situation in which it inappropriately can file an additional brief. In that situation we may dismiss the cross-appeal. *See, e.g.*, *Rite Aid of Pa. v. Houstoun*, 171 F.3d 842, 849 (3d Cir. 1999).

Turning to the merits of the cross-appeal, we are concerned only with the district court's grant of summary judgment in favor of Liberty Mutual on USX's claim for bad faith denial of coverage (Count III). As the foregoing discussion of Liberty Mutual's appeal portends, we will affirm the grant of summary judgment in favor of Liberty Mutual on this claim because USX's bad faith claim necessarily fails in light of our determination that Liberty Mutual correctly concluded that there was no potential coverage under the policy. *See The Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999) (affirming district court which held that, under Pennsylvania law, "bad faith claims cannot survive a determination that there was no duty to defend, because the court's determination that there was no potential coverage means that the insurer had good cause to refuse to defend").[18]

USX asserts that it was necessary for it to include the materials constituting a sur-reply in its reply brief on its cross-appeal because it faced the situation of having to respond to Liberty Mutual and its "captive Amici" by whom USX claims to have been "triple teamed." Cross-Appellee's Opp'n at 3-4. This excuse does not impress us for if USX wanted to submit a brief not in accordance with Fed. R. App. P. 28(c), its appropriate course would have been to seek leave of this court, as it did with its previous unsuccessful requests to exceed page limitations in responding to Liberty Mutual's appeal.

[18] USX cites *Britamco Underwriters, Inc., v. C.J.H. Inc.*, 845 F. Supp. 1090, 1093-94 (E.D. Pa.), *aff'd*, 37 F.3d 1485 (3d Cir. 1994) (table), for the proposition that an insurer's duty to defend may be broader than its duty to indemnify. We do not doubt this proposition, but, as *Britamco* notes, the duty to defend ends if "the insurer can confine the claim to recovery that is not within the scope of the coverage." *Id.* In this case Liberty Mutual has done

V. CONCLUSION

For the foregoing reasons, we will reverse the order granting partial summary judgment in favor of USX entered on June 27, 2002, and will reverse the final judgment in its favor entered on January 9, 2004, including the $2,200,000 monetary award, and will affirm the order granting partial summary judgment and final judgment in favor of Liberty Mutual. In addition, inasmuch as Liberty Mutual was entitled to a complete summary judgment on its motion in the district court, we will remand the case to the district court for entry of a summary judgment in its favor on Counts I, II, and IV of the complaint. *See Coar v. Kazimir*, 990 F.2d 1413, 1416 (3d Cir. 1993).

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exactly that, and therefore it has neither the duty to defend nor the duty to indemnify USX.

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

No. 01-0889

[Filed January 7, 2004]

USX CORPORATION,	)
	)
Plaintiff	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
	)
Defendant.	)
	)

JUDGMENT ORDER

This matter came before the Court on a Motion for Summary Judgment filed by Defendant Liberty Mutual Insurance Company ("Liberty Mutual") which sought a determination, as a matter of law, that Liberty Mutual does not have a duty to defend and indemnify USX Corporation (f/k/a United States Steel Corporation) ("USX") in any of the claims alleged in the underlying action and a Cross-Motion For Summary Judgment filed by USX which sought a

declaration that Liberty Mutual has a duty to defend and indemnify USX in the claims alleged in the underlying action (Count I - Declaratory Judgment, Count II Breach of Contract and Count IV - Indemnity) and to pay USX damages for bad faith in connection with Liberty Mutual's denial of insurance coverage (Count III - insurance Bad Faith). The Cross-Motions were heard by United States Magistrate Judge Ila Sensenich. On May 14, 2002, Magistrate Judge Sensenich issued a Report and Recommendation in which she recommended that the Motion of Liberty Mutual be denied, that the Motion of USX as it related to Counts I, II and IV of the Complaint be granted, and that the damages claim of USX based on insurance bad faith (Count III) be denied.

The Report and Recommendation was reviewed by then Chief United States District Court Judge, Donald E. Ziegler, who adopted the Report and Recommendation as the Opinion of the Court by Order dated June 27, 2002. On June 6, 2003, by Order of Chief United States District Judge Donetta W. Ambrose, this case was transferred to Judge Terrence F. McVerry for all further proceedings.

USX and Liberty Mutual have agreed that the attorneys' fees, defense costs, and pre-judgement interest that is owed to USX by Liberty Mutual as a result of the Court Order is $2,200,000. The parties have settled and finally resolved all other claims and issues between them, except that each has reserved the right to appeal their respective adverse decision of the Court.

NOW THEREFORE, this 7th day of January, 2004, it is **ORDERED, ADJUDGED and DECREED** that in accordance with the June 27, 2002 Court Order by which the United States Magistrate Judge's Report and Recommendation was adopted, Final Judgment is hereby entered in favor of

USX and against Liberty Mutual on Counts I, II and IV of the Complaint and USX is awarded damages, inclusive of pre-judgment interest, in the total amount of $2,200,000. Final Judgment is also hereby entered in favor of Liberty Mutual and against USX on Count III of the Complaint. All other matters shall be governed by the Parties' settlement agreement. Each party shall bear its own costs.

BY THE COURT:

/s/
Terrence F. McVerry
United States District Court Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 01-889

[Filed June 27, 2002]

USX CORPORATION,	)
	)
Plaintiff	)
	)
vs.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
	)
Defendant	)
	)

MEMORANDUM ORDER

On May 22, 2001, this case was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation filed on May 15, 2002, recommended that Defendant's Motion for

Summary Judgment be granted as to Count III. It further recommended that Plaintiff's Cross-Motion for Summary Judgment be granted as to Counts I, II, and IV, and that Count V be dismissed as moot. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties. Objections and response to objections have been filed to the report and recommendation. After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 27th day of June, 2002;

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted as to Count III;

IT IS FURTHER ORDERED that Plaintiff's Cross-Motion for Summary Judgment is granted as to Counts I, II, and IV, and that Count V is dismissed as moot.

The Report and Recommendation of Magistate Judge Sensenich, dated May 14, 2002, is adopted as the opinion of the court.

/s/
Donald E. Ziegler
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 01-889

[Filed May 14, 2002]

USX CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
LIBERTY MUTUAL INSURANCE COMPANY,	)
	)
Defendant.	)
	)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that Defendant's Motion for Summary Judgment be granted as to Count III. It is further recommended that Plaintiff's Cross-Motion for Summary Judgment be granted as to Counts I, II, and IV, and that Count V be dismissed as moot.

II. REPORT

Plaintiff USX Corporation, formerly known and now again known as United States Steel Corporation ("USX"), brings this action for declaratory relief, breach of insurance contract and bad faith against Defendant Liberty Mutual Insurance Company ("Liberty Mutual") pursuant to Liberty Mutual's refusal to defend and indemnify USX under an employer's liability insurance policy. USX alleges that Liberty Mutual breached its duty to defend and indemnify by wrongly characterizing claims for injury caused by asbestos as "bodily injury by disease" (to which a coverage exclusion applies) instead of as "bodily injury by accident" (which would be covered by the policy).

Liberty Mutual filed a Motion for Summary Judgment on October 1, 2001. USX filed a Cross-Motion for Summary Judgment on February 21, 2002. The issue before the court is whether a physical injury caused by exposure to asbestos constitutes a "bodily injury by accident" or a "bodily injury by disease" under an employer's liability insurance policy.

A. Statement of Facts

In 1912, Liberty Mutual issued to USX an initial employer's liability policy which was renewed annually through December 31, 1979. (Plt.'s Cross-Mot. For Summ. J., Exhibit B ("Lerach Aff.") at ¶ 4 (Doc. # 46)). The initial policy and the renewal policies were ordered by and delivered to USX at its Pittsburgh, Pennsylvania principal place of business. *(Id.* at ¶ 5).

Commencing with a complaint filed by French Hicks in the 1990s, and continuing to date, more than 200 claims have been filed on or behalf of present or former USX employees

seeking damages for injuries sustained due to asbestos exposure while employed by USX, its divisions and/or subsidiaries, in the state of Texas, during the effective dates of one or more of the policies issued by Liberty Mutual. *(Id.* at ¶ 10). By letter dated June 27, 1997, USX forwarded to Liberty Mutual the initial seventeen underlying Summons and Complaints, requesting defense and indemnity. Eventually, Mr. Charles Brake, Liberty Mutual's Chief Claims Examiner, directed its Houston, Texas office to send USX a denial of coverage letter for the claims. The basis for Liberty Mutual's refusal to defend and indemnify was that the claims fell under the policy's "bodily injury by disease" provision, which was governed by an applicable exclusion. (Plt.'s Cross-Mot. For Summ. J., Exhibit E ("Brake Depo.") at pp. 68-69; Exhibit I ("Brake Letter") (Doc. # 46)).

The Liberty Mutual policies at issue provide coverage for "damages because of bodily injury by accident or disease ...." (Plt.'s Cross-Mot. For Summ. J., Exhibit A ("Policy") at p. 1 (Doc. # 46)). The policy defines these terms as follows:

> **(b) Bodily Injury by Accident; Bodily Injury by Disease** The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(Id.) Under "Exclusions," the policy states that coverage does not apply "(c) to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for

damages because of such injury . . . ." *(Id.)*. It is undisputed that USX did not renew the Liberty Mutual policy after December 31, 1979 and that it did not request defense and indemnity for the asbestos claims in the underlying cases until 1997.

After Liberty Mutual's rejection of its claims, USX filed a complaint containing claims for breach of contract ("Count I"), declaratory relief ("Count II"), bad faith ("Count III"), indemnity ("Count IV"), and contract reformation ("Count V"). USX alleges that asbestos-related injuries are claims which are covered by the policy because they constitute "bodily injury by accident" rather than "bodily injury by disease" or, in the alternative, that the contract should be reformed as the policy terms were not made clear and such a contract is against public policy. Liberty Mutual counters that asbestos-related disease constitutes "bodily injury by disease" and, as such, coverage is barred under applicable exclusions governing the policy which are valid and enforceable.

B. Standard for Summary Judgment

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden

has been met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty-Lobby, Inc.*, 477 U.S. 242, 248 (1986).

C. Discussion

Defendant moves for summary judgment on all counts of the Complaint, on the basis that physical injury by asbestos exposure constitutes a "bodily injury by disease" which is not covered based on certain exclusions in the policy. Plaintiff also presents a cross-motion for summary judgment arguing that its insurance claims were within the scope of coverage of the Liberty Mutual policies because the injuries caused by asbestos exposure constitute "bodily injury by accident" to which no exclusions apply, thus entitling USX to summary judgment as to its breach of contract claim and to defense and indemnity for those claims.

This case is based on this court's diversity jurisdiction. (Compl. ¶ 3 (Doc. # 1)). In a diversity action, a federal court is compelled to apply the same law as would be applied by the courts of the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). As the parties are in agreement that Pennsylvania law is controlling, they have raised no conflict-of-law issue and the court will therefore proceed under Pennsylvania law. (*See* Plt.'s Br. in Supp. of Cross-Mot. for Summ. J. at 5; Def.'s Opp. to Cross-Mot. for Summ. J. at 2 (Doc. # 50)).

To ascertain whether Defendant breached its duty to defend and indemnify, the court must look to the applicable insurance policy. Ambiguous language in an insurance contract does not raise a genuine issue of material fact. Under Pennsylvania law, interpretation of an insurance contract is a question of law. *See Federal Insur. Co. v. McAnally*, Civ. A. No. 91-7676, 1992 WL 245871, *2 (E.D. Pa. Sept. 2, 1992), *citing State Farm Mutual Insurance Company v. Judge*, 405 Pa. Super. 376, 592 A.2d 712, 713 (1990). Ambiguities in the language of an insurance policy are interpreted in favor of the insured. *See id., citing Standard Venetian Blind Co., v. American Empire Ins. Co.*, 503 Pa. 300, 469 A.2d 563, 565 (1983) and *Cohen v. Erie Indemnity Co.*, 288 Pa.Super 445, 432 A.2d 596, 597 (1981). "A provision of an insurance contract is 'ambiguous' if reasonably intelligent people could differ as to its meaning." *Pennsylvania National Mutual Casualty Insurance Company v. Traveler's Insurance Company*, 405 Pa. Super 149, 592 A.2d 51, 54 (1991).

1. **Interpretation of the Policy.**

In the Liberty Mutual policy at issue, the central concern is whether, under the language of the policy, physical injuries caused by exposure to asbestos constitute "bodily injury by accident" or "bodily injury by disease." It is clear on the face of the policy and it is undisputed by the parties that the 36-month exclusion upon which Defendant relies, which requires that all claims for "bodily injury by disease" be filed within 36 months of the end of the policy period, applies only to physical injuries characterized as "bodily injury by disease." (Plt.'s Cross-Mot. For Summ. J., Exhibit A ("Policy") at p. 1 (Doc. # 46)). As such, if an injury caused by exposure to asbestos constitutes a "bodily injury by accident" within the meaning of the policy language, then such injuries fall within the scope of coverage of the policy and Defendant is

responsible for the defense and indemnity of the claims at issue.

The policy states that it covers "bodily injury by accident or disease." (Plt.'s Cross-Mot. For Summ. J., Exhibit A ("Policy") at p. 1 (Doc. # 46)). "[E]xposure to asbestos causes immediate 'bodily injury'" under the terms of an insurance policy that offers coverage for "bodily injury." *J.H. France Refractories Co. v. Allstate Insur. Co.*, 534 Pa. 29, 626 A.2d 502, 506 (1993). The parties do not dispute that exposure to asbestos causes "bodily injury" within the meaning of that term under the policy.

The operative terms at issue, then, are "accident" and "disease." The policy offers only a limited, oblique definition of each term. "Disease" is defined purely by what the term does not encompass, meaning "only such disease as is **not included** within the term 'bodily injury by accident.'" (Plt.'s Cross-Mot. For Summ. J., Exhibit A ("Policy") at p. 1 (Doc. # 46)) (emphasis added). The definition of "disease" therefore, is ambiguous. It does not give a frame of reference or set of factors to use to discern the type of disease intended to be covered by the term "bodily injury by disease." It does, however, posit the existence of a disease that will be covered by the policy under the term "bodily injury by accident," even though the policy is careful to separate coverage for bodily injury into two distinct categories, "accident" and "disease."

The policy likewise defines the term "accident" in a similarly oblique fashion:

> The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and **only such disease as results**

directly from bodily injury by accident is included within the term "bodily injury by accident."

Id. (emphasis added). The definition of the term "accident" here is also ambiguous. It does not set forth the parameters of what an accident is other than to state what it is not. It does, however, similar to the definition of "disease," provide that if a disease results from an injury sustained by accident, despite the fact that it is a disease, it will be covered by the policy under the term "bodily injury by accident."

In interpreting insurance policies to determine whether the claims asserted are within the scope of coverage, the court shall adopt that interpretation which is most favorable to the insured, "even if the insured is a commercial or business entity and, therefore, presumably knowledgeable about contract law and legal terminology." *Northwestern National Casualty Co. v. Century III Chevrolet, Inc.*, 863 F.Supp. 246, 250 (W.D.Pa. 1994). If the language of an insurance policy is susceptible to more than one reasonable interpretation, it will be found ambiguous and must be construed in favor of the insured. *Curcio v. John Hancock Mutual Life Insur. Co.*, 33 F.3d 226, 231 (3d Cir. 1994). As the specific terms "disease" and "accident" are ambiguous in the policy at issue and subject to more than one reasonable interpretation, they will here be construed against the insurer and in favor of the insured.

Defendant argues that the asbestos-related injuries in the underlying suits constitute "bodily injury by disease" under the policy because "asbestos-related disease does not allege immediate injury but rather exposure over an extended period of time" and this is the "very characteristic that distinguishes 'bodily injury by accident' from 'bodily injury by disease.'" (Def.'s Br. in Supp. of Mot. for Summ. J. at 10 (Doc. # 19)).

Defendant thus attempts to define "bodily injury by disease" as disease which is not necessarily caused by an injury but instead from exposure over an extended period of time, although it cites no language in the policy that supports this interpretation other than the ambiguous terms discussed previously. Nothing in the policy defines the term "bodily injury by disease" to mean only a disease caused by continuous exposure over a long period.

While asbestos-related diseases are often characterized by repeated exposure over a period of time, the etiology and pathogenesis of asbestos-related disease more readily conforms it to the category "bodily injury by accident" and disease resulting directly therefrom under the policy. Inhalation of asbestos causes a "direct injury', that "occurs within minutes after asbestos fibers enter the cells":

> the medical evidence of discrete cellular injuries occurring upon exposure to asbestos justifies the conclusion that exposure to asbestos causes **immediate 'bodily injury'**...

J.H. France, 626 A.2d at 505-506 (emphasis added). Once inhalation of asbestos occurs, a continuing disease process is set in motion, whereby "the injuries continue to occur even after exposure ends during the progression of the disease right up until the time that increasing incapacitation results in manifestation as a recognizable disease." *Id.* at 507. It is well-settled that the inhalation of asbestos fibers is linked to the development of asbestosis, mesothelioma and other asbestos-related diseases. *ACandS Inc. v. Aetna Casualty and Surety Co.*, 764 F.2d 968, 970 (3d Cir. 1985). "Pleural plaques, pleural fibrosis, asbestosis, mesothelioma, and other asbestos related diseases are diseases that result directly from the cumulative bodily injuries caused by the inhalation of asbestos

fibers." (Plt.'s Cross-Mot. For Summ. J., Exhibit D ("Dr. Sachs Aff.") at ¶ 13 (Doc. # 46)). The inhalation of asbestos constitutes an immediate bodily injury that (eventually) directly results in asbestos-related disease. Simply because the disease takes time to develop does not mean it does not directly result from the injury. As such, a reasonable interpretation of the terms "accident" and "disease" is that asbestos-related disease constitutes "bodily injury by accident" under the policy.

Liberty Mutual cites a Louisiana state court case, *Hubbs v. Anco Insulations, Inc.*, 747 So.2d 804 (La. Ct. App. 1999), for the opposite conclusion. In *Hubbs*, the court considered whether a standard employer's liability policy which provided coverage for bodily injury by accident or disease, with a 36-month exclusion for disease claims, covered a worker who had died of asbestosis long after the 36-month period. The court attempted to define the difference between "bodily injury by accident" and resultant disease and "bodily injury by disease" by giving an example:

> [Bodily injury by accident [is] tetanus that directly results from stepping on a rusty nail ... [r]arely do we intentionally contract a disease, and most disease results from contact with something, be it a foreign substance, bacteria, or a virus. But to find that disease that results from accidental contact with a foreign body, such as an asbestos fiber, is bodily injury by accident would be to subsume the definition of bodily injury by disease into the definition of bodily injury by accident.

Hubbs, 747 So.2d at 807-808.

This case is distinguishable in many ways. First, under the Supremacy Clause, a federal court is not bound by state court precedent except when deciding a non-federal issue in a diversity case. Even then, a federal court need only follow the precedent of the forum state. In the instant case, because Pennsylvania law is controlling, the court is not bound by Louisiana state court precedent and so need not follow *Hubbs*.

In addition, the Louisiana court's example of a disease caused by an accident does not clarify the situation. No one intends to step on a rusty nail and develop tetanus; the injury occurs by an accident that later results in disease. Similarly, no one intends to inhale asbestos fibers and develop asbestosis; the injury occurs by an accident that later results in disease. A person who steps on a nail accidentally encounters a hazard that can result in a disease, tetanus; similarly, a person who inhales asbestos fibers accidentally encounters a hazard that can result in a disease, asbestosis. The nail-tetanus example simply illustrates the concept that an accidental injury is an unintended injury which can precipitate a disease. If anything, the Louisiana court's example underscores how asbestosis, like tetanus, is a disease that directly results from an accident and is therefore a "bodily injury by accident."

When the language of an insurance policy is susceptible to more than one reasonable interpretation, it will be found ambiguous and must be construed in favor of the insured. *Curcio v. John Hancock Mutual Life Insur. Co.*, 33 F.3d 226, 231 (3d Cir. 1994). As the specific terms "disease" and "accident" are ambiguous in the policy at issue and can reasonably be construed to mean that asbestosis is the type of disease covered under "bodily injury by accident," these terms should be construed against Liberty Mutual and in favor of USX to result in a finding that asbestosis is a disease that

directly results from the immediate injury caused by the inhalation of asbestos fibers such that it constitutes a "bodily injury by accident" under the terms of the policy.

Liberty Mutual's refusal to defend and indemnify, therefore, constitutes a breach of the insurance contract and it is recommended that Plaintiff's Cross-Motion for Summary Judgment on Count I (breach of contract), Count II (declaratory relief), and Count IV (indemnity) be granted and that Count V (contract reformation) be dismissed as moot.

2. Plaintiff's Bad Faith Claim.

Plaintiff also moves for summary judgment on its claim for bad faith regarding Liberty Mutual's refusal to defend USX and indemnify it for the underlying Texas actions. An insurer's duty to defend an insured in litigation is broader than the duty to indemnify. *The Frog, Switch & Mfg. Co., Inc. v. The Travelers Insur. Co.*, 193 F.3d 742, 746 (3d Cir. 1999). The duty to defend arises "whenever an underlying complaint may 'potentially' come within the insurance coverage." *Id., citing Erie Ins. Exch. v. Claypoole*, 449 Pa. Super. 142, 673 A.2d 348, 355 (1996). If even only a single claim in a multi-claim suit is potentially covered, then "the insurer must defend all claims until there is no possibility that the underlying plaintiff could recover on a covered claim." *Frog*, 193 F.3d at 746, *citing Erie Ins. Exch. v. Transamerica Ins. Co.*, 516 Pa. 574, 533 A.2d 1363, 1368 (1987). When determining whether the insurer has a duty to defend, "the factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured." *Frog, id., citing Biborosch v. Transamerica Ins. Co.*, 412 Pa. Super. 505, 603 A.2d 1050, 1052 (1992).

In the insurance context, "bad faith" on the part of an insurer is any frivolous or unfounded refusal to pay the proceeds of a policy; it is not necessary that such refusal be fraudulent. *Colletti v. Life Investors Insur. Co. of America*, 2000 WL 361683 at *4 (E.D. Pa. April 6, 2000). In an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith. *Id., citing Terletsky v. Prudential Property and Cas. Ins. Co.*, 437 Pa. Super 108, 649 A.2d 680, 688 (1994). To prevail, a plaintiff must demonstrate "(1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis." *Colletti*, 2000 WL at *4, *citing Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 233 (3d Cir. 1997).

USX argues that Liberty Mutual could not have made a good faith denial of its claims premised on a reasonable basis because "for nearly a decade before the initial claims were denied, Pennsylvania law made clear that inhalation of asbestos fibers causes an immediate accidental injury." (Plt.'s Br. in Supp. of Cross-Mot. for Summ. J. at 34 (Doc. # 46)). *J.H. France*, however, does not hold that the inhalation of asbestos fibers is an "immediate accidental injury," but only that such exposure constitutes an "immediate 'bodily injury.'" 626 A.2d at 506. The court held that while such injury creates an initial trigger of an insurer's liability, asbestos exposure also spawns a "multiple-trigger approach" whereby all stages of the asbestos disease process are regarded as "bodily injury" sufficient to trigger the insurer's obligation to indemnify. *Id.* at 507. The court was not presented with the issue of whether asbestos exposure constituted "bodily injury by accident" or "bodily injury by disease," as the policy in question covered "bodily injury, sickness or disease" caused

by an "occurrence," which the policy defined as "an accident, *including continuous or repeated exposure to conditions,* which result in bodily injury. . ." *J.H. France*, 626 A.2d at 506-507 (emphasis in original).

In the case at bar, Liberty Mutual demonstrated a reasonable basis for its refusal to defend and indemnify USX. Given that Pennsylvania had not yet ruled on the central issue, it was reasonable for Liberty Mutual to look to other jurisdictions for guidance. Defendant relied on *Hubbs v. Anco Insulations, Inc.* to support its interpretation of the insurance policy coverage and applicable exclusions. Under similar facts, the court in *Hubbs* interpreted a policy containing similar provisions to those at issue here and found that "bodily injury by accident" did not include coverage for asbestos-related disease. 747 So.2d at 808. Once Defendant had determined that case law existed supporting its interpretation of the policy, it was then reasonable for Defendant to deny defense and indemnity as, under *Hubbs*, the underlying claims all fell under "bodily injury by disease" which would similarly be excluded under Liberty Mutual's 36-month exclusion.

As the court found in *J.H. France* when denying the insured's claim for bad faith, it is inappropriate "to attribute bad faith to parties which relied on the reasoning and approaches that other courts have found convincing, when there ha[s] been no definitive precedent in this jurisdiction." 626 A.2d at 510. As Liberty Mutual demonstrated a good faith basis for its denial of defense and indemnity, it is recommended that Plaintiff's Cross-Motion for Summary Judgment on Count III (bad faith) be denied and that Defendant's Motion for Summary Judgment on Count III be granted.

III. CONCLUSION

For the reasons discussed above, it is recommended that Defendant's Motion for Summary Judgment be granted as to Count III. It is further recommended that Plaintiff's Cross-Motion for Summary Judgment be granted as to Counts I, II, and IV, and that Count V be dismissed as moot. In accordance with the Magistrates Act, 28 U.S.C. § 636(b) (1) (B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/
ILA SENSENICH
U.S. Magistrate Judge

Dated: May 14, 2002

APPENDIX F

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

LIBERTY MUTUAL
INSURANCE COMPANY
Boston, Massachusetts
(A mutual insurance company, herein called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I

Coverage A - WORKMAN'S COMPENSATION To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.

Coverage B - EMPLOYERS' LIABILITY To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in Item 3

of the declarations or in operations necessary or incidental thereto.

II

DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS As respects the insurance afforded by the other terms of this policy the company shall:

(a) defend any proceeding against the insured seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligations to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such proceeding or suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) reimburse the insured of all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in

addition to the amounts payable under coverage A or the applicable limit of liability under coverage B.

III

DEFINITIONS

(a) **Workmen's Compensation Law** The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in Item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.

(b) **State** The word "state" means any State or Territory of the United States of America and the District of Columbia.

(c) **Bodily Injury by Accident: Bodily Injury by Disease** The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(d) **Assault and Battery** Under coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV

APPLICATION OF POLICY This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the

insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

(a) to operations conducted at or from any workplace not described in Item 1 or 4 of the declarations if the insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;

(b) unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;

(c) under coverage B, to liability assumed by the insured under any contract or agreement;

(d) under coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee employed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;

(e) under coverage B, to bodily injury to disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;

(f) under coverage B, to any obligation for which the insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in Item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

PREMIUM The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the company. This policy is issued by the company and accepted by the insured with the agreement that if any change in classifications, rates or rating plans is or becomes applicable to this policy under any law regulating this insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the company, earned during the policy period by (a) all executive officers and other employees of the insured engaged in operations covered by this policy, and (b) any other person performing work which may render the company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall not include the remuneration of any person within division (b) foregoing if the insured maintains evidence satisfactory to the company that the payment of compensation and other benefits under such law to such person is secured by other valid and collectible insurance or by any other undertaking approved by the governmental agency having jurisdiction thereof.

If the declarations provide for adjustment of premium on other than an annual basis, the insured shall pay the deposit premium to the company upon the inception of this policy and thereafter interim premiums shall be computed in accordance

with the manuals in use by the company and paid by the insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the company until termination of this policy and credited to the final premium adjustment.

The insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct. If the insured does not furnish records of the remuneration of persons within division (b) of the definition of remuneration foregoing, the remuneration of such persons shall be computed in accordance with the manuals in use by the company.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the premium previously paid, the insured shall pay the excess to the company; if less, the company shall return to the insured the unearned portion paid by the insured. All premiums shall be fully earned whether any workmen's compensation law, or any part thereof, is or shall be declared invalid or unconstitutional.

2

LONG TERM POLICY If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months

period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the company with respect to classifications of operations for which this policy provided a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the company.

3

PARTNERSHIP OR JOINT VENTURE AS INSURED If the insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an insured only while he is acting within the scope of his duties as such partner or member.

4

INSPECTION AND AUDIT The company and any rating authority having jurisdiction by law shall each be permitted to inspect the workplaces, machinery and equipment covered by this policy and to examine and audit the insured's books, vouchers, contracts, documents and records of any and every kind at any reasonable time during the policy period and any

extension thereof and within three years after termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

5

NOTICE OF INJURY When an injury occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the injured and of available witnesses.

6

NOTICE OF CLAIM OR SUIT If claim is made or suit or other proceeding is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

7

ASSISTANCE AND COOPERATION OF THE INSURED The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits or proceedings. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the workmen's compensation law.

STATUTORY PROVISIONS - Coverage A The company shall be directly and primarily liable to any person entitled to the benefits of the workmen's compensation law under this policy. The obligations of the company may be enforced by such person, or for his benefit by any agency authorized by law, whether against the company alone or jointly with the insured. Bankruptcy or insolvency of the insured or of the insured's estate, or any default of the insured, shall not relieve the company of any of its obligations under coverage A.

As between the employee and the company, notice or knowledge of the injury on the part of the insured shall be notice or knowledge, as the case may be, on the part of the company; the jurisdiction of the insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the company and the company shall in all things be bound by the subject to the findings, judgments, awards, decrees, orders or decisions rendered against the insured in the form and manner provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.

All of the provisions of the workmen's compensation law shall be and remain a part of this policy as fully and completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds, and assessments required of or levied against compensation insurance carriers under such law.

The insured shall reimburse the company for any payments required of the company under the workmen's compensation law, in excess of the benefits regularly provided by such law, solely because of injury to (a) any employee by reason of the

serious and wilful misconduct of the insured, or (b) any employee employed by the insured in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof.

Nothing herein shall relieve the insured of the obligations imposed upon the insured by the other terms of this policy.

9

LIMITS OF LIABILITY - Coverage B The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in the declarations for coverage B is the total limit of the company's liability for all damages because of bodily injury by accident, including death of any time resulting therefrom, sustained by one or more employees in any one accident. The limit of liability stated in the declarations for coverage B is the total limit of the company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one or more employees of the insured in operations in any one state designated in Item 3 of the declarations or in operations necessary or incidental thereto.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability

10

ACTION AGAINST COMPANY - Coverage B No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations under coverage B.

11

OTHER INSURANCE If the insured has other insurance against a loss covered by this policy, the company shall not be liable to the insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

12

SUBROGATION In the event of any payment under this policy, the company shall be subrogated to all rights of recovery therefor of the insured and any person entitled to the benefits of this policy against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13

CHANGES Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary or the company and, if such signatures are facsimile signatures, countersigned by a duly authorized representative of the company.

14

ASSIGNMENT Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancelation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancelation of this policy.

CANCELATION This policy may be canceled by the insured by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be canceled except in accordance with the law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

16

TERMS OF POLICY CONFORMED TO STATUTE - Coverage A Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

17

DECLARATIONS By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

18

MUTUAL POLICY CONDITIONS This policy is non-assessable. The policyholder is a member of the company and shall participate, to the extent and upon the conditions fixed and determined by the board of directors in accordance with the provisions of law, in the distribution of dividends, so fixed and determined.

In witness whereof, the company has caused this policy to be singed by its President and its Secretary at Boston, Massachusetts, and countersigned on the declarations page by a duly authorized representative of the company.

/s/ _____ /s/ _____

Secretary President

APPENDIX G

EMPLOYERS' LIABILITY POLICY

LIBERTY MUTUAL
INSURANCE COMPANY
Boston, Massachusetts
(A mutual insurance company, herein called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURINGAGREEMENTS

I

COVERAGE To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom,

(a) sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in Item 3 of the declarations or in operations necessary or incidental thereto, or

(b) sustained while temporarily outside the United States of America, its territories or possessions, or Canada by any employee of the insured who is a citizen or

resident of the United States or Canada arising out of and in the course of his employment by the insured in connection with operations in a state designated in Item 3 of the declarations; but this insurance does not apply to any suit brought in or any judgment rendered by any court outside the United States of America, its territories or possessions, or Canada or to an action on such judgment wherever brought.

II -

DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS As respects the insurance afforded by the other terms of this policy the company shall:

(a) defend any suit against the insured alleging such injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III

DEFINITIONS

(a) **State** The word "state" means any State or Territory of the the United States of America, the District of Columbia and any Province or Territory of Canada.

(b) **Bodily Injury by Accident: Bodily Injury by Disease** The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(c) **Assault and Battery** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV

APPLICATION OF POLICY This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

(a) to liability assumed by the insured under any contract or agreement, but this exclusion does not apply to a warranty that work performed by or on behalf of the insured will be done in a workmanlike manner;

(b) to punitive or exemplary damages on account of bodily injury to or death of any employee employed in violation of law or with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;

(c) to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;

(d) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law or under any similar law.

CONDITIONS

I

PREMIUM The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the company.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the company, earned during the policy period by all executive officers and other employees of the insured engaged in operations covered by this policy.

If the declarations provide for adjustment of premium on other than an annual basis, the insured shall pay the deposit premium to the company upon the inception of this policy and thereafter interim premiums shall be computed in accordance with the manuals in use by the company and paid by the insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the company until termination of this policy and credited to the final premium adjustment.

The insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the premium previously paid, the insured shall pay the excess to the company; if less, the company shall return to the insured the unearned portion paid by the insured.

2

PARTNERSHIP OR JOINT VENTURE AS INSURED If the insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an insured only while he is acting within the scope of his duties as such partner or member.

3

INSPECTION AND AUDIT The company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the work-places, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such workplaces, operations, machinery or equipment are safe.

The company and any rating authority having jurisdiction by law shall each be permitted to examine and audit the insured's payroll records, general, ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis, or relate to the subject matter of this insurance.

4

NOTICE OF INJURY When an injury occurs written notice shall be given by or on behalf of the insured to the

company or any of its authorized agents as soon as practicable. Such notice shall contain particulars, sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the injured and of available witnesses.

5

NOTICE OF CLAIM OR SUIT If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

6

ASSISTANCE AND COOPERATION OF THE INSURED The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7

LIMITS OF LIABILITY The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in Insuring Agreement I include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained

from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. For Insuring Agreement I the limit of liability stated in the declarations as applicable to "each employee" is the limit of the company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one employee in any one accident; subject to the foregoing provision respecting each employee, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by two or more employees in any one accident; the limit of liability stated in the declarations as applicable to "each employee" is the limit of the company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one employee; and subject to the foregoing provision respecting each employee the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by two or more employees of the insured in operations, in any one state designated in Item 3 of the declarations or in operations necessary or incidental thereto.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

8

ACTION AGAINST COMPANY No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, not until the amount of the insured's obligation to pay

shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or the insured's estate shall not relieve the company of any of its obligations hereunder.

9

OTHER INSURANCE If the insured has other insurance against a loss covered by this policy, the company shall not be liable to the insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

10

SUBROGATION In the event of any payment under this policy, the company shall be subrogated to all rights of recovery therefor against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

11

CHANGES Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary of the company and, if such signatures are facsimile signatures, countersigned by a duly authorized representative of the company.

12

ASSIGNMENT Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancelation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancelation of this policy.

13

CANCELATION This policy may be canceled by the insured by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient

proof of notice. The effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, unless the manual in use by the company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured, but payment or tender of unearned premium is not a condition of cancelation.

14

DECLARATIONS By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

15

MUTUAL POLICY CONDITIONS This policy is nonassessable. The policyholder is a member of the company and shall participate, to the extent and upon the conditions fixed and determined by the board of directors in accordance

with provisions of law, in the distribution of dividends so fixed and determined.

In witness whereof, the company has caused this policy to be signed by its President and its Secretary at Boston, Massachusetts, and countersigned on the declarations page by a duly authorized representative of the company.

/s/ _____	/s/ _____
Secretary	President

APPENDIX H

COMMONWEALTH OF PENNSYLVANIA)
: SS
COUNTY OF ALLEGHENY)

AFFIDAVIT OF MURRAY SACHS, M.D.

TO-WIT:

This day personally appeared MURRAY SACHS, M.D., who, after having first duly been sworn upon his oath, deposes and states as follows:

1. My name is Murray Sachs, M.D.

2. I am licensed to practice medicine in the Commonwealth of Pennsylvania, and I received my license in 1958.

3. In 1965 I became board certified in internal medicine

4. Attached hereto is my Curriculum Vitae.

5. I currently have my professional offices at Medical Thoracic Associates, Shadyside Medical Center, 5200 Centre Avenue, Suite 903, Pittsburgh, Allegheny County, Pennsylvania.

6. I am on the active staff of three hospitals; namely, Shadyside Hospital, St. Margaret Memorial Hospital, and Braddock Hospital.

7. I am an expert in asbestos-related injuries and diseases, and have had many patients who were accidentally exposed to asbestos fibers in their workplaces.

8. I was told to assume that the applicable Liberty Mutual Insurance Company policy has the following definition:

> ***Bodily Injury by Accident; Bodily Injury by Disease***
> *The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "'bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident".*

9. I have read the testimony of Dr. John E. Craighead as summarized by the Supreme Court of Pennsylvania in *J.H. France Refractories v. Allstate*, 626 A.2d 502 (Pa. 1993) and agree with Dr. Craighead's testimony that:

- "Injury" is a "process which alters structure, and the term is applicable in reference to a cell, a tissue, an organ, or the entire body.

- "Disease" means an injury and a response to that injury.

- The inhalation of asbestos fibers into the lungs stimulates a wide range of reactions, which can be divided into three responses.

  First, asbestos fibers in the respiratory tract interact with the membranes of the cells lining the trachea and cause the release of enzymes and superoxides which either damage or kill individual cells. If sufficient cells are damaged, tissue (an accumulation of cells) is damaged or destroyed. This injury occurs within minutes after asbestos fibers enter the cells.

  Second, the presence of asbestos fibers stimulates macrophages to accumulate. Macrophages are scavenger cells which attempt to envelope foreign particles. As macrophages attempt to ingest the fibers, there is a release of enzymes which have a damaging effect on tissue. There is also a chemical reaction which scars the injured tissue. The accumulation of scar tissue in the respiratory system prevents the lung from performing its normal oxygen-carbon dioxide gas exchange. The process of macrophage accumulation, tissue scarring and functional impairment of the lungs begins to occur within a month of exposure.

  The **third** response in the asbestosis process is a change in the form of the cells lining the bronchial tree. The normal lining, designed to move dust particles out of the body, is replaced by cells lacking cilia, resulting in a tendency toward accumulation of asbestos particles.

10. An initial bodily injury occurs during the development of asbestosis and other asbestos related diseases immediately upon inhalation of the asbestos fibers.

11. Each time there is an inhalation of asbestos fibers additional bodily injuries occur.

12. An accumulation of bodily injuries caused by inhalation of asbestos fibers interferes with the body's defense mechanisms designed for protection against foreign matter.

13. Pleural plaques, pleural fibrosis, asbestosis, mesothelioma, and other asbestos related diseases are diseases that result **directly** from the cumulative bodily injuries caused by the inhalation of asbestos fibers.

14. Using the Liberty Mutual Insurance Company definition of ***"Bodily Injury by Accident"*** quoted in 8, above, the inhalation of asbestos fibers causes an immediate bodily injury by accident and any asbestos related diseases that result from such injuries are also "bodily injury by accident" as defined in the policy.

15. AND FURTHER THIS AFFIANT SAYETH NAUGHT.

/s/_____
MURRAY SACHS, M.D.

SWORN TO AND SUBSCRIBED in my presence, this 23rd day of January, 2002.

/s/_____
Lisa M. Santimauro
NOTARY PUBLIC

My Commission Expires:
4-15-02